

# EXHIBIT A

1 COLLEEN BAL (*pro hac vice*)  
cbal@wsgr.com  
2 BART E. VOLKMER (*pro hac vice*)  
bvolkmer@wsgr.com  
3 WILSON SONSINI GOODRICH & ROSATI  
650 Page Mill Road  
Palo Alto, Ca 94304-1050  
4 Telephone: (650) 493-9300  
Facsimile: (650) 493-6811  
5

KURT OPSAHL (*pro hac vice*)  
kurt@eff.org  
CORYNNE MCSHERRY (*pro hac vice*)  
corynne@eff.org  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco, Ca 94110  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

6 CHAD BOWERS  
bowers@lawyer.com  
7 CHAD A. BOWERS, LTD  
Nevada State Bar No. 7283  
8 3202 West Charleston Boulevard  
Las Vegas, Nevada 89102  
9 Telephone: (702) 457-1001

10 Attorneys For Defendant & Counterclaimant  
11 THOMAS A. DIBIASE  
12

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

15 Righthaven LLC, a Nevada limited- ) CASE NO.: 2:10-cv-01343-RLH-PAL  
liability company, )  
16 Plaintiff, )  
17 v. )  
18 Thomas A. Dibiase, an individual, )  
19 Defendant. )  
20 )  
21 Thomas A. Dibiase, an individual, )  
22 Counterclaimant, )  
23 v. )  
24 Righthaven LLC, a Nevada limited- )  
liability company, )  
25 Counter-defendant. )  
26 )  
27 )  
28 )

**UNREDACTED VERSION OF  
DEFENDANT-COUNTERCLAIMANT  
THOMAS A. DIBIASE'S MOTION TO  
DISMISS FOR LACK OF SUBJECT-  
MATTER JURISDICTION**

1 **TABLE OF CONTENTS**

		Page
3	MOTION .....	1
4	MEMORANDUM OF POINTS AND AUTHORITIES .....	1
5	I. INTRODUCTION .....	1
6	II. FACTUAL BACKGROUND .....	2
7	A. Righthaven's Complaint & Its Ownership Allegations .....	2
8	B. The Strategic Alliance Agreement Between Righthaven And Stephens .....	2
9	III. ARGUMENT .....	5
10	A. Righthaven Lacks Standing To Sue Over The McMurdo Article .....	6
11	B. The Assignment Fails Because The SAA Is Champertous .....	10
12	1. Righthaven Has No Legitimate Interest In This Litigation .....	11
13	2. Righthaven Undertook This Litigation At Its Own Expense .....	11
14	3. Righthaven Undertook This Litigation In Consideration Of Receiving A Portion Of The Proceeds Of The Litigation .....	12
15	C. The Court Should Dismiss This Case With Prejudice, Enter Judgment In Mr. DiBiase's Favor And Consider Ordering Righthaven To Show Cause Why Other Copyright Actions Pending In This District Should Not Be Dismissed .....	13
16	IV. CONCLUSION .....	15
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

## **TABLE OF AUTHORITIES**

## CASES

4	<i>Allstate Ins. Co. v. Hughes</i> , 358 F.3d 1089 (9th Cir. 2004) .....	14
5	<i>Althin v. West Suburban Kidney Center</i> , 874 F. Supp. 837 (N.D. Ill. 1994) .....	9
6	<i>Augustine v. U.S.</i> , 704 F.2d 1074 (9th Cir. 1983) .....	5
7	<i>Campbell v. Trustees of Stanford University</i> , 817 F.2d 499 (9th Cir. 1987) .....	7
8	<i>Del Webb Communities, Inc. v. Partington</i> , No. 2:08-cv-00571, 2009 WL 3053709 .....	10, 12
9	<i>Gator.com Corp. v. L.L. Bean, Inc.</i> , 398 F.3d 1125 (9th Cir. 2005) .....	5, 9
10	<i>Graham v. La Crosse &amp; M.R. Co.</i> 102 U.S. 148 (1880) .....	13
11	<i>Gruber v. Baker</i> , 20 Nev. 453, 23 P. 858 (1890) .....	12
12	<i>In re Primus</i> , 436 U.S. 412 (1978) .....	10
13	<i>Lake Washington School Dist. No. 414 v. Office of Superintendent of Public</i> , 634 F.3d 1065 (9th Cir. 2011) .....	5
14	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	6
15	<i>Lum v. Stinnett</i> , 87 Nev. 402, 488 P.2d 347 (1971) .....	10, 12
16	<i>Martin v. Morgan Drive Away, Inc.</i> , 665 F.2d 598 (5th Cir. 1982), <i>cert. dismissed</i> , 458 U.S. 1122 (1982) .....	10
17	<i>Nafal v. Carter</i> , 540 F. Supp. 2d 1128 (C.D. Cal. 2007), <i>aff'd</i> 388 Fed. Appx. 721 (9th Cir. 2010) .....	8, 9
18	<i>Rambus Inc. v. Nvidia Corp.</i> , 2009 WL 636536 (N.D. Cal. 2009) .....	14
19	<i>Righthaven LLC v. Pahrump Life</i> , Case No. 2:10-cv-01575-JCM-PAL .....	14
20	<i>Righthaven v. Majorwager.com</i> , No. 2:10-cv-00484, 2010 WL 4386499 (D. Nev. Oct. 28, 2010) .....	9
21	<i>Schwartz v. Eliades</i> , 113 Nev. 586, 939 P.2d 1034 (Nev. 1997) .....	10, 12
22	<i>Silvers v. Sony Pictures Entertainment, Inc.</i> , 402 F.3d 881 (9th Cir. 2005) .....	6, 7, 8, 9
23	<i>Spencer Enterprises, Inc. v. U.S.</i> , 345 F.3d 683 (9th Cir. 2002) .....	14
24	<i>US Naval Institute v. Charter Communications</i> , 936 F.2d 692 (2nd Cir. 1991) .....	7
25	<i>Vianix Delaware LLC v. Nuance Communications, Inc.</i> , No. 09-0067, 2009 WL 1364346 (D. Del. May 12, 2009) .....	6

	<b>STATUTES</b>
1	17 U.S.C. § 101 .....
2	17 U.S.C. § 106 .....
3	17 U.S.C. § 501 .....
4	
5	<b>RULES</b>
6	Fed. R. Civ. P. 12(h)(3) .....
7	Local Rule 7.1-1 .....
8	
9	<b>MISCELLANEOUS</b>
10	PATRY ON COPYRIGHT (2009).....
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

**MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(h)(3), Defendant-counterclaimant Thomas A. DiBiase (“Mr. DiBiase”) respectfully moves to dismiss Righthaven’s Complaint with prejudice for lack of subject-matter jurisdiction. This motion is supported by the accompanying memorandum of points and authorities and the declaration of Bart E. Volkmer.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

8 Defendant-counterclaimant Thomas A. DiBiase (“Mr. DiBiase”) moves to dismiss  
9 Plaintiff/counter-defendant Righthaven LLC’s (“Righthaven”) copyright-infringement claim  
10 pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject-matter jurisdiction. A recently produced  
11 Strategic Alliance Agreement (“SAA”) between Righthaven and Stephens Media (“Stephens”)  
12 shows—beyond any genuine dispute—that Righthaven does not own or have sufficient rights in  
13 the copyright at issue in this case to file a copyright-infringement lawsuit. While Righthaven  
14 bases its ownership claim on an alleged assignment from Stephens, the SAA demonstrates that  
15 Stephens has only granted Righthaven a qualified right to bring suit. The Copyright Act and an  
16 *en banc* opinion from the Ninth Circuit make clear that an assignment of a copyright cause of  
17 action is not enough to establish standing. In addition, the SAA is an illegal arrangement for  
18 champerty, violating the venerable policy that one may not establish a business to enforce the  
19 rights that others are not disposed to enforce. As a champertous agreement, the purported  
20 assignment is a nullity, and Righthaven has not lawfully acquired the copyright underlying its  
21 claim. Accordingly, the Court lacks Article III jurisdiction to adjudicate Righthaven’s copyright-  
22 infringement lawsuit and it should be dismissed with prejudice.

23 In addition, Mr. DiBiase notes that Righthaven has filed hundreds of lawsuits in this  
24 district apparently based on identical sham assignments, several of which are pending before this  
25 Court. Where the defendants in those cases lack representation and, therefore, are not well-  
26 positioned to raise the standing issue, Mr. DiBiase respectfully urges the Court to consider  
27 ordering Righthaven to show cause why those cases should not also be dismissed for lack of  
28 Article III standing.

1      **II. FACTUAL BACKGROUND**2      **A. Righthaven's Complaint & Its Ownership Allegations**

3      On August 9, 2010, Righthaven filed this action. *See* Dkt. No. 1. Righthaven alleges that  
 4      Mr. DiBiase, a former Assistant United States Attorney, committed copyright infringement by  
 5      posting to his criminal-justice blog a June 11, 2010 *Las Vegas Review-Journal* ("LVRJ") article  
 6      written by Doug McMurdo entitled "Man who killed wife sought ultimate sentence" (the  
 7      "McMurdo Article"). Compl. ¶¶ 6-9. Righthaven claims to be the "owner" of the McMurdo  
 8      Article. Compl. ¶¶ 6, 18, 25. Righthaven also alleges that it "holds the exclusive right" to  
 9      reproduce, distribute, publicly display, and prepare derivative works of the article pursuant to 17  
 10     U.S.C. § 106(1), § 106(2), § 106(3) and § 106(5). Compl. ¶¶ 25-28. Those are curious assertions  
 11     in light of the fact that the article was written by a LVRJ reporter and to this day remains available  
 12     for free on the LVRJ website. Righthaven claims ownership based on a transfer "by written  
 13     agreement" from Stephens, the publisher of the LVRJ. Compl. Ex. 4. Righthaven did not attach  
 14     to the Complaint the agreement governing its relationship with Stephens and did not produce that  
 15     document with its initial disclosures served in January 2011. Instead, it waited until April 8,  
 16     2011—eight months after the case was filed—to turn over the document as a "Supplemental Initial  
 17     Disclosure." Volkmer Decl., ¶ 2.

18      **B. The Strategic Alliance Agreement Between Righthaven And Stephens**

19      ***Background of the SAA:*** Righthaven is run by lawyers. Stephens owns the LVRJ, which  
 20     publishes and presumably owns various news articles. If Stephens believes that its copyrights are  
 21     being infringed and wishes to pursue legal remedies, the customary path would have been to hire  
 22     counsel and proceed with litigation. But that is not what Stephens did. Instead, Stephens and  
 23     Righthaven entered into an elaborate—and until very recently, secret—Strategic Alliance  
 24     Agreement under which Righthaven's lawyer-principals were purportedly granted the right to sue  
 25     over Stephens' copyrights without Stephens being named as a party to the litigation. If that  
 26     arrangement were valid, it would provide an enormous benefit to Stephens, which could more  
 27     easily avoid the costs, discovery burdens, and reputational damage of being a party to an  
 28     aggressive litigation campaign that has targeted hundreds of individuals and non-profit groups.

1 Righthaven stood to benefit, too. It would not face the constraints of representing a client in  
 2 litigation. Instead, Righthaven would be representing itself while prosecuting the claims of  
 3 another.

4       ***The SAA’s Litigation Scheme:*** The SAA states that Stephens shall “assign” to Righthaven  
 5 certain classes of copyrights that might be subject to later copyright-infringement actions. SAA §  
 6 3.1 (Volkmer Decl., Ex. A). Righthaven then has sixty days to inform Stephens whether it intends  
 7 to file suit over the “assigned” copyrights. *Id.* § 3.3. If not, Righthaven must “reassign” back to  
 8 Stephens the copyrights that it passes on. *Id.* If Righthaven elects to proceed with litigation, it  
 9 generally must file suit within six to twelve months. *Id.* §§ 3.3, 4. Stephens, however, has veto  
 10 power over Righthaven’s lawsuits if the putative defendant is a charitable organization, judgment-  
 11 proof, is affiliated with Stephens, or has a “valued business relationship” with Stephens. *Id.* § 3.4.  
 12 Righthaven has the option of making settlement demands of would-be defendants prior to  
 13 commencing litigation. *Id.* § 4. Upon recovering in an infringement action, Righthaven must pay  
 14 Stephens 50% of the proceeds, less costs. *Id.* § 5.<sup>1</sup>

15       ***The Sham Assignment Provision:*** The purported “assignment” of copyrights from  
 16 Stephens to Righthaven is a sham. Even after the purported “assignment,” Stephens retains the  
 17 unfettered right to “Exploit” the works that are subject to the alleged assignment. SAA § 7.2. And  
 18 Righthaven has “no right or license to Exploit or participate in the receipt of royalties from the  
 19 Exploitation of the Stephens Media Assigned Copyrights,” other than to collect 50% of the  
 20 proceeds from infringement lawsuits. *Id.* Under the SAA, the term “exploit” is broadly defined:  
 21 the term means “to use, make, sell, or otherwise exploit in any manner whatsoever (through any  
 22 means now known or hereafter [d]eveloped).” SAA, Schedule 1 - Definitions at 13. The upshot of  
 23 the provision is that Righthaven does not have *any* rights with respect to the “assigned” copyrights  
 24 other than to file lawsuits and collect a share of the proceeds. Stephens retains all of the other  
 25 rights, without any duty to pay Righthaven a single cent for the money it makes licensing the

---

26       <sup>1</sup> Pursuant to Local Rule 7.1-1, Righthaven should have disclosed Stephens’ pecuniary  
 27 interest in this case. *See* Dkt. No. 6 (Righthaven’s Certificate of Interested Parties, listing only  
 28 Righthaven and its owners Net Sortie LLC and SI Content Monitor LLC, but omitting Stephens).

1 “assigned” copyrights. In this case, Stephens has all of the rights to commercially exploit the  
 2 McMurdo Article and Righthaven has none. That explains why the article still appears on the  
 3 LVRJ website without any indicia of an “assignment” to Righthaven.<sup>2</sup>

4       ***The Illusory Nature of the Assignment:*** The purported assignment is a sham on its face,  
 5 but suffers from yet another defect: it is illusory. Stephens purports to retain “the right at any time  
 6 to terminate, in good faith, any Copyright Assignment . . . and enjoy a right of complete reversion  
 7 to the ownership of any copyright . . . .” SAA § 8. If Stephens elects to exercise this “reversion”  
 8 option with respect to any copyright that Righthaven has sued over, then Stephens becomes  
 9 responsible for effectuating the termination of the litigation, is responsible for any losses  
 10 associated with the dismissal, and must compensate Righthaven for the work it has put in. *Id.*  
 11 This provision purports to vest with Stephens the right to have a copyright assigned back to it on  
 12 demand, and to put a stop to any action that Righthaven has commenced. If Righthaven actually  
 13 owned the copyright to the McMurdo article, it could not be encumbered in this way.

14       ***Stephens’ Representations in the SAA:*** The artificial nature of the alleged assignment is  
 15 also borne out by the representations that Stephens makes in the SAA. Stephens represents that it  
 16 will not “sell,” encumber or “assign” to any third party the very copyrights that it has purported to  
 17 “assign” to Righthaven, unless it receives Righthaven’s permission first. SAA § 9.3. That  
 18 provision only makes sense if Stephens has not, in fact, assigned copyrights to Righthaven at all.  
 19 Indeed, Stephens retains the right to use the “assigned” copyrights as collateral when receiving  
 20 funding, so long as they are not singled out in the loan documents. *Id.* Stephens also represents  
 21 that it will not settle any of the cases that Righthaven has brought unless it receives Righthaven’s  
 22 approval. *Id.* These representations are entirely inconsistent with a true assignment and entirely  
 23 consistent with Stephens attempting to assign a naked cause of action for copyright infringement to  
 24 Righthaven.

25  
 26  
 27       

---

<sup>2</sup> See McMurdo Article, available at <http://www.lvrj.com/news/retired-teacher-gets-death-penalty-for-wife-s-murder-96191524.html> (“Copyright © Stephens Media LLC 1997 – 2011”).  
 28

### 9    III. ARGUMENT

Righthaven’s case against Mr. DiBiase should be dismissed under Rule 12(h)(3) for lack of subject-matter jurisdiction. Righthaven has not suffered any injury-in-fact under Article III of the Constitution and lacks statutory standing under the Copyright Act because it does not own the McMurdo Article, nor does it have sufficient rights in it to bring suit. The law is well established that a copyright owner may not assign a cause of action for copyright infringement to a third party. Instead, a party may only bring an action for copyright infringement if it is the legal or beneficial owner of an exclusive copyright interest. Here, the purported assignment from Stephens to Righthaven does not vest Righthaven with any ownership rights in the McMurdo Article. The only thing that Righthaven has actually received from Stephens is a heavily qualified right to file infringement suits based on certain Stephens’ newspaper articles and to share in the proceeds from those lawsuits. That is not close to being enough to effectuate a valid assignment under the text of the Copyright Act or under binding Ninth Circuit authority and, in fact—as explained below—the purported assignment is void as champertous. Righthaven lacks standing to bring suit over the McMurdo Article, and this action should be dismissed with prejudice under Rule 12(h)(3) because Righthaven cannot show subject-matter jurisdiction over its copyright claim. *See Augustine v. U.S.*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983) (“subject matter jurisdiction . . . may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3)”).

1                   **A. Righthaven Lacks Standing To Sue Over The McMurdo Article.**

2                   Righthaven does not own sufficient rights in the McMurdo Article to bring suit over it and  
 3 therefore lacks standing to bring this action. “Standing is both a constitutional and statutory  
 4 principle.” *Lake Washington School Dist. No. 414 v. Office of Superintendent of Public*, 634 F.3d  
 5 1065, 1067 (9th Cir. 2011). “It is an inexorable command of the United States Constitution that  
 6 the federal courts confine themselves to deciding actual cases and controversies.” *Gator.com*  
 7 *Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 (9th Cir. 2005) (en banc). To have standing under  
 8 Article III of the Constitution, a federal-court “plaintiff must have suffered an ‘injury in fact’—an  
 9 invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or  
 10 imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561  
 11 (1992) (citations and quotations omitted). Under the Copyright Act, only “[t]he legal or beneficial  
 12 owner of an exclusive right under a copyright is entitled . . . to institute an action for any  
 13 infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C.  
 14 § 501(b). “The bare assignment of an accrued [copyright] cause of action is impermissible.”  
 15 *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005). Where a plaintiff  
 16 “is not the owner of the copyrights, and it does not have a beneficial interest in the copyrights it  
 17 alleges defendant violated, it could not have suffered an invasion of its legally protected interest.”  
 18 *Vianix Delaware LLC v. Nuance Communications, Inc.*, No. 09-0067, 2009 WL 1364346, at \*2  
 19 (D. Del. May 12, 2009) (holding that plaintiff did not have standing to bring copyright  
 20 infringement action because it did not own or retain a beneficial interest in copyrights at issue).

21                   A proper standing analysis in a copyright action starts with the Copyright Act’s text.  
 22 Section 501(b) states that only “[t]he legal or beneficial owner of an exclusive right under a  
 23 copyright” is entitled to bring suit. 17 U.S.C. § 501(b). Section 106 of the Copyright Act defines  
 24 the relevant “exclusive rights” in the copyright for the McMurdo Article:

25                   ■ to reproduce the copyrighted work in copies or phonorecords;  
 26                   ■ to prepare derivative works based upon the copyrighted work;  
 27                   ■ to distribute copies or phonorecords of the copyrighted work to the public by sale or other  
 28                   transfer of ownership, or by rental, lease, or lending; and

1       ■ to display the copyrighted work publicly.  
 2 17 U.S.C. § 106(1), (2), (3), (5). Righthaven is not the legal or beneficial owner of *any* exclusive  
 3 Section 106 rights in the McMurdo Article. The SAA says that Stephens “shall retain” the right to  
 4 exploit the article in all forms: *only Stephens* has the exclusive right to reproduce, prepare  
 5 derivative works, distribute copies, and publicly display the article. SAA § 7.2. Specifically,  
 6 Section 7.2 provides that Stephens Media “shall retain . . . an exclusive license to Exploit the  
 7 Stephens Media Assigned Copyrights for any lawful purpose whatsoever.” “Exploit” is a defined  
 8 term, meaning “to use, make, sell, or otherwise exploit in any manner whatsoever.” SAA,  
 9 Schedule 1 – Definitions at 13. Taken together, Section 7.2 and the definition of Exploit cover  
 10 every possible exclusive right in the McMurdo Article. Righthaven has “no right” to exploit the  
 11 article or even receive royalties from Stephens’ commercial exploitation. *Id.* Instead, Righthaven  
 12 merely has “the right to proceeds” from copyright-infringement lawsuits. *Id.* That is not an  
 13 exclusive right under the Copyright Act and does not vest Righthaven with the right to sue. *See* 17  
 14 U.S.C. § 501(b) (only legal or beneficial owners may bring suit).

15       The SAA’s terms do not purport to transfer any exclusive rights from Stephens to  
 16 Righthaven in the first instance. But even if Righthaven received those rights and transferred them  
 17 back to Stephens, the Article III standing result would be exactly the same.<sup>3</sup> A copyright owner  
 18 that licenses all of its Section 106 right on an exclusive basis to a third party may not thereafter file  
 19 suit based on that copyright. *See* 17 U.S.C. § 101 (defining “transfer of copyright ownership” to  
 20 include an “exclusive license”); *see Campbell v. Trustees of Stanford University*, 817 F.2d 499,  
 21 504 (9th Cir. 1987) (Stanford University purported “to retain ‘ownership’ of the copyrights”  
 22 despite giving an exclusive license to a third party. However, the Ninth Circuit looked past the  
 23 labels of the contract into the nature of the rights, and determined that “Stanford clearly transferred  
 24 part of this property interest monopoly to CPP in the form of an exclusive license.”); *see also U.S.*  
 25 *Naval Institute v. Charter Commc’ns*, 936 F.2d 692, 695 (2nd Cir. 1991) (“An exclusive license

---

26       <sup>3</sup> As an alternative, the SAA provides that Righthaven gives an exclusive license of all rights  
 27 to Stephens in the event that the SAA is construed to diminish Stephens’ ability to exercise the  
 28 all rights of ownership. SAA § 7.2.

1 granted by the copyright owner constitutes a transfer of ownership of the copyright rights  
 2 conveyed in the license.”).

3       While the text of the Copyright Act is abundantly clear, binding authority from an *en banc*  
 4 Ninth Circuit panel settles the standing question. In *Silvers v. Sony Pictures*, the Ninth Circuit  
 5 addressed whether a copyright owner could assign an accrued cause of action for copyright  
 6 infringement to a third party without also transferring to that third party any of its exclusive  
 7 Section 106 rights. 402 F.3d at 890. A copyright owner in a movie had purported to assign  
 8 “claims and causes of action” to a script writer so that she could file an action against an alleged  
 9 infringer. *Id.* at 883. Citing Section 501(b) of the Copyright Act, the Court concluded that a  
 10 plaintiff “must have a legal or beneficial interest in at least one of the exclusive rights described in  
 11 § 106” to bring a copyright-infringement action. *Id.* at 885. And even a legal or beneficial owner  
 12 “is not entitled to sue unless the alleged infringement occurred while he or she was the owner of  
 13 it.” *Id.* at 885 (quotation, citation and alteration brackets omitted). Because the scriptwriter did not  
 14 own any Section 106 rights based on the assignment of a cause of action, the Court ruled that she  
 15 lacked standing to pursue her copyright claim. *Id.* at 890.

16       The rule in *Silvers* bars Righthaven’s claim against Mr. DiBiase. There is no dispute that  
 17 Stephens purported to “assign” the copyright in the McMurdo Article to Righthaven. If the  
 18 assignment had been unconditional, it facially might have vested Righthaven with the right to sue  
 19 for infringement that allegedly occurred while Righthaven was the owner.<sup>4</sup> But along with the  
 20 assignment, Stephens either *retains* or Righthaven *gave back* to Stephens all of its exclusive  
 21 Section 106 rights. SAA § 7.2. Righthaven has “no right” to exploit the McMurdo Article  
 22 commercially (except for filing lawsuits). This structure is indistinguishable from the bare  
 23 attempted conveyance of a cause of action for copyright infringement that *Silvers* prohibits. The  
 24 label that the parties have used—“assignment”—does not make any difference.

25       Indeed, Righthaven has *even fewer rights* in the relevant content than had the plaintiff in  
 26 *Silvers*. In that case, the plaintiff purportedly was granted the unconditional right to sue certain

---

27       <sup>4</sup> As discussed below, the assignment would still be void because it is champertous.  
 28

1 defendants. 402 F.3d at 883. Here, Righthaven is allegedly given the right to sue, but Stephens  
 2 has veto rights over those lawsuits, even after litigation has commenced. Righthaven's interest in  
 3 this action has all of the trappings of an attorney being paid by a contingency fee, rather than a  
 4 copyright owner suing to protect its intellectual property.

5 A 2007 Central District of California case, *Nafal v. Carter*, applied *Silvers* on very similar  
 6 facts and concluded that the plaintiff lacked standing to sue. *See Nafal v. Carter*, 540 F. Supp. 2d  
 7 1128 (C.D. Cal. 2007), *aff'd* 388 Fed. Appx. 721 (9th Cir. 2010) (unpublished). *Nafal* concerned  
 8 standing to sue over a melody from an Egyptian song that was allegedly infringed by "Big  
 9 Pimpin'," a musical work produced by artist Shawn Carter (known as Jay-Z). *Id.* at 1130. The  
 10 plaintiff based standing on an "Assignment Agreement" that purported to give him an ownership  
 11 interest and the right to sue. *Id.* at 1134. The court found that the plaintiff's description of the  
 12 document as an "Assignment Agreement" was "not dispositive." *Id.* at 1141. Instead, the nature  
 13 of the transaction was "governed by the substance of what was given to the licensee and not the  
 14 label that the parties put on the agreement." *Id.* at 1142-43 (quoting *Althin v. West Suburban  
 15 Kidney Center*, 874 F. Supp. 837, 843 (N.D. Ill. 1994)).

16 The court concluded that the instrument at issue did not vest the plaintiff with sufficient  
 17 rights to file suit. And that agreement is remarkably similar to the SAA: (1) the copyright owner,  
 18 (and purported assignor) retained nearly exclusive exploitation rights in the copyrighted  
 19 composition; (2) the plaintiff was required to file suit or the alleged "assignment" would  
 20 terminate; (3) the alleged assignor retained broad discretion about which defendants the plaintiff  
 21 could sue; and (4) there were no identified Section 106 rights over which the plaintiff had  
 22 exclusive control. *Nafal*, 540 F. Supp. 2d at 1132-34. On appeal, the Ninth Circuit affirmed,  
 23 holding that the "assignment documents at issue here did not actually grant Plaintiff an ownership  
 24 interest in an exclusive copyright license. Rather, the documents were a disguised assignment of a  
 25 cause of action prohibited under [*Silvers*]." *Nafal*, 388 Fed. Appx. at 723, *accord Righthaven v.  
 26 Majorwager.com*, No. 2:10-cv-00484, 2010 WL 4386499, at \*2 n.2 (D. Nev. Oct. 28, 2010)  
 27 ("Regardless of the assignment's assertions, if only a right to sue was transferred; Plaintiff may  
 28 lack standing."). That is exactly how the SAA operates and the result should be the same.

1 \* \* \*

2 Righthaven does not own any exclusive legal or beneficial rights in the copyright to the  
 3 McMurdo Article. Accordingly, Righthaven lacks standing to continue prosecuting this action and  
 4 it should be dismissed under Rule 12(h)(3). *See Gator.com*, 398 F.3d at 1128-29 (“Article III  
 5 requires that a live controversy persist throughout all stages of the litigation.”).

6 **B. The Assignment Fails Because The SAA Is Champertous.**

7 The SAA fails for another reason: even if it accomplished its attempted goal of assigning  
 8 the right to sue (it does not), it would be void as champertous. “A champertous agreement is one  
 9 in which a person without interest in another’s litigation undertakes to carry on the litigation at his  
 10 own expense, in whole or in part, in consideration of receiving, in the event of success, a part of  
 11 the proceeds of the litigation.” *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 603 (5th Cir.  
 12 1982) (quoted with approval by the Nevada Supreme Court in *Schwartz v. Eliades*, 113 Nev. 586,  
 13 588, 939 P.2d 1034 (Nev. 1997)). “The laws against champerty, maintenance, and barratry are  
 14 aimed at the prevention of multitudinous and useless lawsuits and at the prevention of speculation  
 15 in lawsuits.” 14 C.J.S. Champerty and Maintenance § 2.<sup>5</sup> In copyright litigation, “the successful  
 16 assertion of [champerty] results in the voiding of the champertous agreement.” William Patry, 2  
 17 PATRY ON COPYRIGHT, § 5:136 at 5-293 (2009). The three elements of champerty are easily  
 18 satisfied here: (1) Righthaven does not have a genuine interest in any alleged infringement of the  
 19 McMurdo Article; (2) Righthaven has undertaken Stephens’ copyright litigation at its own  
 20 expense; and (3) Righthaven has done so with the expectation of receiving a part of the litigation  
 21 proceeds in the event of success.

22

23

---

24 <sup>5</sup> Champerty is a flavor of maintenance, and a part of barratry. As this Court has explained,  
 25 ““maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a  
 26 financial interest in the outcome; and barratry is a continuing practice of maintenance or  
 27 champerty.”” *Del Webb Communities, Inc. v. Partington*, No. 2:08-cv-00571, 2009 WL 3053709,  
 28 at\* 3 (D. Nev. Sep. 18, 2009) (quoting *In re Primus*, 436 U.S. 412, 424 n. 15 (1978)); *see also*  
*Lum v. Stinnett*, 87 Nev. 402 at 408, 488 P.2d 347 (1971) (Nevada Supreme Court describing  
 champerty and maintenance, citing 14 C.J.S. Champerty and Maintenance).

1                   **1.       Righthaven Has No Legitimate Interest In This Litigation.**

2           Righthaven has no legitimate interest in this lawsuit because Stephens—not Righthaven—  
 3   owns the copyright in the McMurdo Article. Indeed, Righthaven’s Operating Agreement  
 4   (“RHOA”) makes clear that Righthaven never intended to have any interest in the works it  
 5   purportedly acquires, beyond filing suit and obtaining a share of litigation proceeds. The  
 6   company’s avowed purpose is to obtain “a limited, revocable assignment (with license-back) of  
 7   copyrights from third Persons in order to enable the Company to recover damages associated with  
 8   Identified Infringements.” RHOA, Section 3.2(c) (Volkmer Decl., Ex. B). This shows that  
 9   Righthaven was never interested in either exploiting the copyright during its litigation (due to the  
 10   license-back scheme), or keeping it after (due to the broad reversion rights that Stephens holds).  
 11   Indeed, the RHOA explicitly states that Stephens “would ultimately enjoy the copyright  
 12   registration upon revocation of the assignment.” RHOA, Section 3.2(d). Thus, Righthaven did  
 13   not start with a genuine interest in lawsuits over Stephens’ copyrights generally.

14           In addition, Righthaven manifestly has no legitimate interest in the McMurdo Article in  
 15   particular. As an initial matter, the McMurdo Article was created after the RHOA and the SAA,  
 16   and thus Righthaven could not have had any interest in it when signing these agreements.  
 17   Instead, pursuant to the SAA, Righthaven was obligated to work to find the alleged basis for a  
 18   lawsuit. SAA § 3.2 and Schedule 1 - Definitions at 14 (Righthaven is required to “employ the  
 19   then available technology and means in Righthaven’s possession to find the occurrence(s) of  
 20   relevant copyright infringement.”). Once the alleged infringement was located, Righthaven did  
 21   not obtain any bona fide interest in the copyright, but rather sought only a sham assignment so that  
 22   it could pursue Stephens’ lawsuit under the guise of a copyright owner. Thus, under the SAA and  
 23   the RHOA, Righthaven has no legitimate interest in the copyright or this lawsuit.

24                   **2.       Righthaven Undertook This Litigation At Its Own Expense.**

25           The SAA provides for Righthaven to conduct litigation over Stephens’ copyrights at its  
 26   own expense. *See* SAA § 4 (“Righthaven shall take an Infringement Action against the Infringer  
 27   ...”), § 6 (“Righthaven shall be responsible for all Costs incurred in an Infringement Action”).  
 28   These “Costs” that Righthaven has agreed to undertake include “any and every expenditure (at

1 commercially reasonable rates) made on the part of Righthaven with respect to an Infringement  
2 Action.” SAA, Schedule 1 – Definitions at 12.

**3. Righthaven Undertook This Litigation In Consideration Of Receiving A Portion Of The Proceeds Of The Litigation.**

5 Righthaven expects to receive—in the event of success—a portion of the proceeds of this  
6 litigation. SAA § 5 (providing for split of the Recovery);<sup>6</sup> *see also* § 10 (providing detailed  
7 procedures to ensure Righthaven will get its part of the proceeds from litigation, even if a  
8 settlement check is made out to Stephens). Moreover, the SAA makes clear that Righthaven’s  
9 interest in the McMurdo Article only concerns litigation proceeds. *See, e.g.*, SAA § 7.2 (Stephens  
10 “shall retain” all rights under Section 106 to exploit the work). Righthaven has no ongoing  
11 interest in the work other than litigation, with Stephens able to terminate the alleged assignment at  
12 any time. SAA § 8.

With these three elements satisfied, it is abundantly clear that Righthaven has engaged in barratry (repeated champerty). While some jurisdictions have replaced this common law doctrine by statute or through other doctrines, “Nevada still recognizes maintenance and champerty.” *Del Webb*, 2009 WL 3053709 at \*4 (citing *Schwartz v. Eliades*, 113 Nev. 586, 588, 939 P.2d 1034 (Nev. 1997)).<sup>7</sup> Under Nevada law, “[t]o maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit.” *Lum*, 87 Nev. at 408 (citing *Gruber v. Baker*, 20 Nev. 453, 23 P. 858, 862 (1890)).

Moreover, the doctrine is particularly well suited to curb abuse of the Copyright Act. Copyright scholar William Patry explains how champerty interacts with copyright law:

<sup>25</sup> 6 “Recovery” is broadly defined as “including, without limitation, all Sums paid by way of  
<sup>26</sup> damages, costs and attorneys fees with respect to or arising from an Infringement Action,” as  
well as settlement proceeds. SAA, Schedule 1 – Definitions at 14.

<sup>7</sup> By its terms, the SAA is to be “interpreted and enforced in accordance with the laws of the State of Nevada.” SAA § 15.3.

1 As applied to copyright, champerty may be found only when there is an assignment  
 2 of the copyright and preexisting causes of action and **where the assignment of the**  
**3 copyright was a sham** designed to disguise the real intent of conveying the chose in  
 4 action. For example, **if the assignment required the assignee to reconvey the**  
**copyright at the conclusion of the litigation, this would be very strong evidence of**  
**champerty. If, however, the assignor continued to exploit the work in a manner**  
**inconsistent with an assignment of rights, a claim of champerty might prove out.**

5 PATRY ON COPYRIGHT, *supra* at § 5:136 (emphasis added).

6 Although his treatise was written before Righthaven began its litigation campaign,  
 7 Professor Patry's example seems to have predicted Righthaven's illegitimate business model. As  
 8 explained above, the assignment is a sham designed to disguise Stephens' attempt to convey, at  
 9 most, a cause of action; the SAA and the RHOA contemplate that Righthaven will return the  
 10 copyright registration in the McMurdo Article to Stephens (SAA § 8 (granting broad reversion  
 11 rights to Stephens); RHOA § 3.2(d) (the assignor will "ultimately enjoy" the copyright  
 12 registration); and Stephens continues to exploit the work, even after the alleged assignment.

13 Accordingly, the SAA is nothing more than an arrangement for barratry, setting forth  
 14 procedures for a series of lawsuits funded by Righthaven over alleged infringement of Stephens'  
 15 copyrights, all for the purpose that Righthaven might be enriched. Indeed, the SAA and RHOA  
 16 show that the very purpose of Righthaven violates the policy behind the doctrine of champerty:  
 17 "'that no encouragement should be given in litigation by the introduction of parties to enforce  
 18 those rights which others are not disposed to enforce.'" PATRY ON COPYRIGHT, *supra* § 5:136 at 5-  
 19 292 (quoting *Graham v. La Crosse & M.R. Co.* 102 U.S. 148, 156 (1880)). As the purported  
 20 assignment is part of a champertous operation, any transfer of the right to sue is void, and  
 21 therefore Righthaven does not have the right to bring this suit. Pursuant to Rule 12(h)(3), the  
 22 Court should dismiss for lack of standing Righthaven's claim against Mr. DiBiase.

23 **C. The Court Should Dismiss This Case With Prejudice, Enter Judgment In**  
**24 Mr. DiBiase's Favor, And Consider Ordering Righthaven To Show Cause**  
**25 Why Other Copyright Actions Pending In This District Should Not Be**  
**Dismissed.**

26 In addition to dismissing the case for lack of standing and champerty, Mr. DiBiase  
 27 respectfully urges the Court to consider ordering Righthaven to show cause why its copyright-  
 28

1 infringement actions pending before the presiding judge in this action and filed against  
2 unrepresented parties should not be dismissed.

3       If the Court grants this motion to dismiss and adjudicates the validity of a purported  
4 copyright assignment from Stephens to Righthaven, that ruling will effect not only this litigation,  
5 but all Righthaven lawsuits based upon assignments from Stephens and the Strategic Alliance  
6 Agreement. While counsel for represented parties will be able to understand and take action upon  
7 this Court's ruling, unrepresented defendants may not be equipped to advance the arguments set  
8 forth above. Thus, Righthaven may well continue to press those defendants into settling cases that  
9 should never have been brought in the first place.

10       Accordingly, this Court can protect unrepresented defendants by ordering—*sua sponte*—  
11 Righthaven to show cause why its cases should not be dismissed. Indeed, this process has already  
12 begun. On April 28, 2011, Judge James Mahan issued an order to show cause in *Righthaven LLC*  
13 *v. Pahrump Life*, Case No. 2:10-cv-01575-JCM-PAL, where the defendant is not represented by  
14 counsel. Judge Mahan explained the importance of resolving the standing question expeditiously:

15       This court believes that the [standing] issue should be addressed at the outset of  
16 Righthaven litigation, as it goes to the plaintiff's standing to bring a copyright  
17 infringement claim at all. Thus, in the interest of judicial economy, the court issues  
this order to show cause why the case should not be dismissed for plaintiff's lack of  
beneficial ownership of the copyright, and, therefore, lack of standing to sue.

18 *Pahrump Life*, Dkt. No. 21 at 2.

19       Based on its inherent authority and in the interest of judicial economy, Mr. DiBiase  
20 respectfully submits that if the Court grants this motion, it consider ordering Righthaven to show  
21 cause why its cases pending before the presiding judge in this action against unrepresented parties  
22 should not be dismissed for lack of Article III standing. *See, e.g., Rambus Inc. v. Nvidia Corp.*,  
23 Nos. C 08-3343 SI, C 08-5500 SI, 2009 WL 636536, at \*2 n.2 (“The trial court possesses inherent  
24 authority to control its docket”); *see also Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 687 (9th  
25 Cir. 2002) (“This Court has the duty to consider subject matter jurisdiction *sua sponte* in every  
26 case, whether the issue is raised by the parties or not.”); *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089,

27

28

1 1093 (9th Cir. 2004) (“The court has a continuing obligation to assess its own subject-matter  
2 jurisdiction, even if the issue is neglected by the parties.”).<sup>8</sup>

3 **IV. CONCLUSION**

4 For the foregoing reasons, Mr. DiBiase respectfully requests that the Court dismiss  
5 Righthaven’s Complaint with prejudice.

6 Dated: May 4, 2011

Respectfully submitted,

7 WILSON SONSINI GOODRICH & ROSATI  
8 Professional Corporation

9 By: /s/ Bart E. Volkmer  
10 COLLEEN BAL (*pro hac vice*)  
11 BART E. VOLKMER (*pro hac vice*)  
650 Page Mill Road  
Palo Alto, California 94304

12 ELECTRONIC FRONTIER FOUNDATION

13 By: /s/ Kurt Opsahl  
14 Kurt Opsahl (*pro hac vice*)  
15 Corynne McSherry (*pro hac vice*)  
454 Shotwell Street  
San Francisco, CA 94110

16 CHAD A. BOWERS, LTD.

17 By: /s/ Chad Bowers  
18 Chad A. Bowers  
19 NV State Bar Number 7283  
3202 W. Charleston Blvd.  
20 Las Vegas, Nevada 89102

21 *Attorneys for Thomas A. DiBiase*

22 \_\_\_\_\_  
23 <sup>8</sup> Righthaven’s pending cases before the presiding judge in this action where counsel has not  
24 appeared for the defendant are: *Righthaven LLC v. Downey*, 2:10-cv-01172-RLH-RJJ; *Righthaven*  
25 *LLC v. Hippen*, 2:10-cv-01454-RLH-LRL (Shawn Mangano, counsel for Righthaven, is  
26 erroneously listed as defendant’s counsel); *Righthaven LLC v. Edmunds*, 2:10-cv-01492-RLH-  
27 RJJ; *Righthaven LLC v. Hoefling et al.*, 2:10-cv-01539-RLH-RJJ; *Righthaven LLC v. Sulimanov et*  
28 *al.*, 2:10-cv-01831-RLH-LRL; *Righthaven LLC v. Stewart*, 2:10-cv-01903-RLH-PAL; *Righthaven*  
29 *LLC v. Barham et al.*, 2:10-cv-02150-RLH-RJJ; *Righthaven LLC v. Peddle*, 2:10-cv-02173-RLH-  
30 LRL; and *Righthaven LLC v. Ashton*, 2:11-cv-00057-RLH-PAL.